ABDUL JALIL ABDUL MUTHALIB

v.

CITY ONE SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S2(S5)21-76-98]
2 DECEMBER 2001

CIVIL PROCEDURE: *Appeal - Notice of appeal - Whether defective - Whether there was a proper appeal for court to adjudicate*

CIVIL PROCEDURE: *Judgments and orders - Perfected order - Setting aside, application for - Whether there were valid grounds for setting aside*

This was an appeal by the plaintiff against the order of the senior assistant registrar ('SAR') dismissing encl. 48 which contained the plaintiff's application to set aside a perfected and sealed order ('the order'), and to approve the plaintiff's draft order without amendment instead.

Held:

[1] The plaintiff's notice of appeal to the judge in chambers was against the order of the SAR given on 4 July 2000 dismissing the plaintiff's application to set aside the order dated 14 June 1999. Unfortunately, there was no such order made by the SAR; the SAR's order was that the plaintiff's application in encl. 48 be dismissed with costs. The notice of appeal was so defective that it stated matters which were contrary to what was ordered; therefore, there was no proper appeal for the court to hear and adjudicate. (pp 748 a-b & 750 d)

[2] There was nothing irregular about the order and there were no legal grounds to set it aside. (p 757 h)

[2a] The plaintiff's solicitors did not return the draft order that was sent by the first defendant's solicitors and so the plaintiff's solicitors were deemed to have consented to the terms thereof. (p 758 e)

[2b] The facts showed that the plaintiff had waived his right to object to the draft order and thus was not entitled to object to the draft order now. (p 759 e)

[2c] The plaintiff's failure to disclose material facts must be construed adversely against him and, consequently, he was not entitled to the assistance of this court. (p 760 d)

[Appeal dismissed.]

Case(s) refered to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(foll)***

Darnley (Earl of) v. Proprietors of London, Chatham and Dover Rly [1867] LR 2 HL 43 ***(foll)***

Han Euu Tiam v. Phang Kui Fatt & Ors [1999] 4 CLJ 395 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murad [1981] 1 MLJ 143 ***(refd)***

Hock Thai Finance Corporation Bhd v. Tai Choi Yu [2000] 5 CLJ 314 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor [1986] 1 CLJ 417; [1986] CLJ (Rep) 371 ***(foll)***

Mohamad Hassan & Ors v. Dewan Bandaraya Kuala Lumpur & Anor [2002] 1 CLJ 290 ***(refd)***

Mohamed Ismail v. Tan Sri Hj Osman Saat & Ors [1982] CLJ 553; [1982] CLJ (Rep) 581 ***(refd)***

Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa [1996] 4 CLJ 461 ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Great Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 ***(refd)***

Sii Toh Sing v. Hung Ming Chung [2000] 2 CLJ 41 ***(refd)***

Tara Rajaratnam v. Datuk Jaginder Singh & Ors [1981] 1 MLJ 97 ***(refd)***

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 ***(foll)***

Tetuan J & S Holdings Sdn Bhd v. A Karim Hasan & Anor [2000] 4 CLJ 152 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 ***(refd)***

Viemar (M) Sdn Bhd & Satu Lagi lwn. DCB Finance Bhd [1998] 5 MLJ 608 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 29

Rules of the High Court 1980, O. 2 r. 2, O. 20 r. 3, O. 32 r. 13(2), O. 34 r. 4(2)(a)-(m), O. 41 r. 1(1), (8), O. 42 rr. 8(1), (2), 9(2), 10(4)

Subordinate Courts Rules 1980, O. 49 r. 6(1)

For the plaintiff - Leow Kian Toon (Mohd Hussein); M/s Khor, Anuar & Khong
For the 1st defendant - Tony Dhana; M/s Tony Dhana & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

The Factual Background

By way of a summons in chambers in encl. 48, the plaintiff sought for the following orders:

(a) that the sealed order dated 14 June 1999 that was signed by the deputy registrar which was prepared and filed by Messrs Tony Dhana & Co on 19 April 2000 be set aside;

(b) that the draft order that was handed by the plaintiff on 8 December 1999 to this Honourable Court be approved with or without an amendment;

(c) that the costs of and occasioned by this application to be determined by this Honourable Court; and

(d) such further or any other relief.

Enclosure 48 was dated 23 May 2000 and it was filed on the same date and it was supported by an affidavit affirmed by the plaintiff on 23 May 2000 and also filed on the same date as seen in encl. 47. Mr. Tony Dhana, the learned counsel for the first defendant, was duly authorised and he affirmed an affidavit in reply for the first defendant on 6 June 2000 which was filed on the same date as seen in encl. 50. The plaintiff responded by way of an affidavit that was affirmed on 16 June 2000 and filed on the same date as seen in encl. 51. Mr. Tony Dhana who was duly authorised by the first defendant affirmed an affidavit in reply for the first defendant on 22 June 2000 which was filed on the same date as reflected in encl. 52. The plaintiff by way of a rebuttal affirmed an affidavit on 22 June 2000 which was filed on 23 June 2000 as seen in encl. 53. Finally, the plaintiff, once again, affirmed an affidavit on 29 June 2000 which was filed on 30 June 2000 as reflected in encl. 55.

Enclosure 48 was scheduled to be heard by the senior assistant registrar of civil five court ("SAR") on 27 June 2000 but one day before that, the first defendant's solicitors sent a notice in writing, as seen in encl. 49, to the plaintiff's solicitors wherein the first defendant raised five preliminary objections which were worded in these fashions:

1. Your said application (referring to enclosure 48) is misconceived in law as a perfected Order cannot be set aside, let alone be set aside by another SAR.

2. You are deemed to have consented to the terms of the said Order and have waived your right to object to it now.

3. You have failed to disclose material facts and are estopped from disputing the said Order now.

4. The affidavit of the plaintiff affirmed on May 23, 2000 (referring to enclosure 47) in support of the said application (referring to enclosure 48) and the subsequent affidavit affirmed on June 16, 2000 (referring to enclosure 51) are defective and inadmissible for failure to comply with Order 41 rule 1(8) of the Rules of the High Court, 1980 ("RHC").

5. The affidavit of the plaintiff affirmed on June 22, 2000 (referring to enclosure 53) is defective and inadmissible for failure to comply with Order 41 rule 1(8) of the RHC and Order 32 rule 13 (2) (b) of the RHC.

The SAR, in due course, heard the preliminary objections and it was apparent that the SAR did not consider the preliminary objections bearing numbers 1, 2 and 3 together with the preliminary objections numbering 4 and 5. In fact the SAR heard the preliminary objections and gave decisions on two occasions. The first was on 28 June 2000 in relation to the preliminary objections numbering 4 and 5. The second was on 4 July 2000 in relation to the preliminary objections numbering 1, 2 and 3. The SAR wrote two written judgments covering the sessions on 28 June 2000 and 4 July 2000. In her written judgment dated 28 June 2000, she alluded to the preliminary objections of the first defendant in regard to the defectiveness of the plaintiff's affidavits in encls. 47, 51 and 53. In her written judgment dated 4 July 2000, the SAR alluded to the preliminary objections numbering 1, 2 and 3.

It was argued before the SAR on 27 June 2000 that the attestation clauses in the affidavits in encls. 47 and 51 ran counter to O. 41 r. 1(8) of the RHC in that it did not contain the titles to the jurat. The case of *Han Euu Tiam v. Phang Kui Fatt & 2 Ors* [1999] 4 CLJ 395 was cited. With respect, there was no necessity for the jurat to be entitled. Order 41 r. 1(1) of the RHC makes no mention about entitlement to the jurat at all. There is no legal requirement that the jurat must bear the title of the action (*Mohamad bin Hassan & 51 Ors v. Dewan Bandaraya Kuala Lumpur & Anor* [2002] 1 CLJ 290). The SAR was right when she ruled that the affidavits in encls. 47 and 51 were admissible notwithstanding that there were no titles to the jurat. The SAR was of the view that she had a wide discretion to allow defective affidavits to be admitted since it would not prejudice the first defendant. The SAR was not prepared to exclude the affidavits in encls. 47 and 51. According to the SAR the plaintiff would be prejudiced if the affidavits in encls. 47 and 51 were excluded. In short, the SAR was not prepared to shut out the plaintiff from presenting his case on the merits. Thus, in so far as the affidavits in encls. 47 and 51 were concerned, the SAR admitted those affidavits. But in so far as encl. 53 was concerned, the SAR refused to accept it – she struck it out without costs. She was motivated to do so on the authority of *Hock Thai Finance Corporation Berhad v. Tai Choi Yu* [2000] 5 CLJ 314 which applied the decision of Mahadev Shankar JCA in *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa* [1996] 4 CLJ 461 where the learned Court of Appeal judge said:

> Order 32 rule 13(2) of RHC was specially enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fail-safe method of causing unwarranted delays by filing affidavits at the last minute. The rule is mandatory.

The SAR held the view that since encl. 53 was not filed and served within 14 days from the service of encl. 52, it ran counter to O. 32 r. 13(2) of the RHC and it should not be used to support the application in encl. 48.

In regard to the preliminary objections numbering 1, 2 and 3 that were argued on 28 June 2000, the SAR agreed with the submissions of Mr. Tony Dhana. Consequently, the SAR dismissed encl. 48 with costs. The SAR held the view, quite rightly, that once the order was perfected the court was said to be *functus officio* unless the order was made in contravention of an Act of Parliament: *Tenaga Nasional Berhad v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553, CA where Gopal Sri Ram JCA speaking for the Court of Appeal observed at p. 561 of the report:

> The inherent jurisdiction in a court to set aside final orders made by it is one that must be exercised with much circumspection. It may be exercised in the case of an order made in contravention of an Act of Parliament. But the jurisdiction does not extend to a final order that is procedurally defective and hence merely irregular.

Aggrieved by the decision of the SAR, the plaintiff filed an appeal to the judge in chambers as seen in encl. 56 which was worded in this way:

> Ambil Perhatian bahawa Plaintif yang dinamakan di atas bercadang hendak merayu terhadap keputusan Penolong Kanan Pendaftar yang diberikan pada 4.7.2000 memerintahkan bahawa permohonan Plaintif untuk mengenepikan Perintah bertarikh 14.6.1999 ditolak tanpa kos.

This judgment concerned the plaintiff and the first defendant only.

Arguments Of The Parties

Before me it was argued by Mr. Tony Dhana that the notice of appeal to the judge in chambers in encl. 56 as alluded to earlier was defective for the following reasons:

(i) That the extracted draft order dated 4 July 2000 made it clear that encl. 48 was dismissed with costs, yet the notice of appeal to the judge in chambers in encl. 56 stated that encl. 48 was dismissed without costs.

(ii) Enclosure 48 had two main prayers:

  (a) to set aside the sealed order dated 14 June 1999 that was signed by the deputy registrar which was prepared and filed by Messrs Tony Dhana & Co on 19 April 2000.

  (b) that the draft order which the plaintiff had handed to this court on 8 December 1999 be approved with or without an amendment.

but, the plaintiff's notice of appeal to the judge in chambers in encl. 56 was against the order of the SAR that was given on 4 July 2000 wherein the SAR was said to have dismissed the plaintiff's application to set aside the order dated 14 June 1999. Unfortunately, there was no such order made by the SAR. On 4 July 2000, the order made by the SAR was this: that the plaintiff's application in encl. 48 be dismissed with costs.

By way of a rebuttal it was argued, by Mr. Leow Kian Toon and assisted by Mr. Mohd Hussein who acted for the plaintiff, that the notice of appeal to the judge in chambers in encl. 56 was perfectly in order. They argued that encl. 56 was not defective. They argued that the first defendant did not file an application to set aside encl. 56 on the ground of irregularity. For this proposition they cited O. 2 r. 2 of the RHC and the case of *Mohamed bin Ismail v. Tan Sri Haji Osman Saat & Ors* [1982] CLJ 553; [1982] CLJ (Rep) 581, a decision of Wan Yahya J (who later rose as a Supreme Court judge) where his Lordship said:

> The 2nd and 3rd Respondents made an attempt to strike out the motion when the 1st Respondent's motion to strike out came up for hearing. The records of proceedings, however, show no visible sign of any written application having been made by either of them. The motion to strike out proceedings were clearly made by the 1st Respondent alone as evidenced by the Notice of Motion itself, wherein it was stated that the court will be moved by Dato' Haji Hassan Yunos and Mr. C.K.G. Pillay, Counsel for Tan Sri Othman Saat, the 1st Respondent, and also at the bottom where it was disclosed that the motion was filed by the solicitors for the 1st Respondent. Nowhere was it mentioned that the application was made on behalf of the 2nd and 3rd Respondents as well. O. 2 r. 2 of the Rules of the High Court reads:
>
> > (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
> >
> > (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.
>
> The 2nd and 3rd Respondent's submission does not merit consideration for non-observation of this rule. Filing an irregular application and not filing one at all have two completely different implications. The irregular one may be saved by O. 2 r. 1 but in a case of an impromptu oral application it must necessarily embarrass not only the unprepared applicant, who, until then, had no notion of an application being made to strike out, but also the court. The oral applications made by the 2nd and 3rd Respondents are refused.

and flowing from these passages, it was argued that even if encl. 56 was irregular it could be cured by way of O. 2 r. 2 of the RHC. It was pointed out that the irregularity did not mislead nor prejudice the first defendant and, consequently, it was urged upon me to proceed and hear the appeal in encl. 56 solely on its merits. Reliance was also placed by the plaintiff on the case of *Tara Rajaratnam v. Datuk Jaginder Singh & Ors* [1981] 1 MLJ 97 FC where Ibrahim Manan FJ writing for the then Federal Court said at p. 98 of the report:

> In respect of the memorandum of appeal it is the contention of Dato' Suppiah that as it was not signed and dated as required under Form 3 it is a nullity and therefore there is no appeal before this court to hear it. In his affidavit Mr. S.P. Naiker stated that the omission to sign and date the memorandum was due to an oversight and the anxiety to file the record of appeal in time. It was prepared by him and after typing he read through the same and at page 4, paragraph 9 he deleted a word and initialled by the side. Then immediately he attended to the other copies in the same manner and initialled them. Having initialled all the copies in his anxiety to have them bound he forgot to sign at the foot of page 7 as required. Several authorities have been cited by Dato' Suppiah but most of them deal with unsigned pleadings. None of them deals with unsigned memorandum of appeal and the case nearest to it is *R. v. Justices of Kent* [1872-3] LR 8 QBD 305 which relates to a notice of appeal which was not unsigned, but signed by the clerk of the appellant's attorney by his authority. It is to be noted, however, that while the signature in the notice of appeal in that case is required by statute (12 & 13 Vic. C. 45 s. 1) the signature in the memorandum of appeal is required in our case by r. 19(3) which provides that 'The Memorandum of Appeal shall be substantially in Form 3' and that even if there is an English equivalent to our r. 95(1) the requirement of the statute would prevail. Mr. S.P. Naiker has given what we consider to be a genuine explanation as to why the memorandum of appeal had not been signed and as it had been filed together with all the documents as required under rule 19(4)(a) to (f) and as the appellant's solicitor had initialled on one of its pages, we are satisfied that it is not a mere fiction and that the grounds stated therein are *bona fide*. We therefore agree with Mr. Cumuraswamy that the failure to sign and date the memorandum of appeal in this case is curable under the said r. 95(1).

With respect, factually speaking *Tara Rajaratnam (supra)* can readily be distinguished. There the failure to sign and date the memorandum of appeal was explained and accepted by the then Federal Court. Here, the notice of appeal to the judge in chambers in encl. 56 did not reflect the true nature of the order of the SAR.

It seemed to me that the crux of the plaintiff's submissions were simply this. That encl. 56 was curable and its irregularity did not pose a hindrance for the appeal to be heard. But the plaintiff overlooked the following salient facts:

(1) that what was appealed against was not even ordered to form the basis of the appeal;

(2) that the notice of appeal in encl. 56 was wrong and not irregular; and as a consequence

(3) there was no valid appeal for this court to hear and adjudicate.

In my judgment, encl. 56 was a notice of appeal to the judge in chambers which was defective in respect of its contents. In *Viemar (M) Sdn Bhd & Satu Lagi lwn. DCB Finance Bhd (dahulunya dikenali sebagai D & C Finance Bhd)* [1998] 5 MLJ 608, the court had to consider the validity of the notice of appeal. There the notice of appeal did not mention the particulars of the decision appealed against or whether the appeal was against the entire decision or only against a portion of it and the court held that the notice of appeal as framed was defective and the appeal was dismissed forthwith. Here, the notice of appeal in encl. 56 was so defective that it stated matters which were contrary to what was ordered. Incidentally, there was no application to cure the defect and that being the case the notice of appeal in encl. 56 was the only notice of appeal, of the day, for me to consider. In my judgment, there was no proper appeal in encl. 56 for me to hear and adjudicate and the plaintiff's appeal ought to be dismissed forthwith.

Undaunted, the plaintiff argued that there must be an application to set aside the defective notice of appeal in encl. 56. With respect, the onus was on the plaintiff to show to this court that he had a valid notice of appeal for this court to hear before this court could even hear him any further. By way of an analogy reference may be made to the case of *Sii Toh Sing v. Hung Ming Chung* [2000] 2 CLJ 41 for guidance. There the court held that unless there was a complete record of appeal with a sealed copy of the order appealed against, the appellant's appeal was not properly before the court and the court had no jurisdiction to hear the case. Here, extending the principle a little further, the notice of appeal in encl. 56 was wrong and there was no proper appeal for this court to hear.

An argument was advanced on behalf of the plaintiff that the decisions of the SAR on the preliminary objections were not in the nature of final orders and thus were not appealable. Indeed if this was so then the plaintiff could not even frame the appeal in encl. 56 since it involved the plaintiff's application which was dismissed based on the preliminary objections. Reliance by the plaintiff on the case of *Tetuan J & S Holdings Sdn Bhd v. A. Karim Hasan & Anor* [2000] 4 CLJ 152 was certainly misplaced. There the court held that the decision of the magistrate on the preliminary objection was not a final decision that finally disposed the rights of the parties within the meaning of

the word "decision" in O. 49 r. 6(1) of the Subordinate Courts Rules 1980 read together with s. 3 of the Courts of Judicature Act 1964. That was a decision of the High Court which was decided on 15 August 2000 and that decision did not take into account the decision of the Court of Appeal in *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377 which was decided on 23 March 1999. The Court of Appeal in *Tycoon Realty Sdn Bhd* held that s. 3 of the Courts of Judicature 1964 was not applicable to civil appeals. Moreover it must not be forgotten that s. 29 of the Courts of Judicature Act 1964 which enacts that "the High Court shall have the like powers and jurisdiction on the hearing of appeals as the Court of Appeal has on the hearing of appeals from the High Court" would certainly give this court the jurisdiction to hold that the appeal in encl. 56 was wrongly phrased and, consequently, there was no proper appeal for this court to hear and adjudicate.

In the event I am wrong and that I have to consider the merits of the appeal in encl. 56 in the context of the summons in chambers in encl. 48, I must next proceed to narrate the facts by referring to the submissions of the parties. I will attempt to set out the chronology of events in these fashions:

(1) The plaintiff filed a summons for directions in encl. 15 on 15 May 1999 which was fixed for hearing on 14 June 1999.

(2) On 14 June 1999, the plaintiff's counsel, without filing a formal application, requested for an order in terms of the further amended writ of summons and the amended statement of claim where the plaintiff had filed them without leave purportedly on the authority of O. 20 r. 3 of the RHC.

(3) The first defendant's counsel was taken by surprise and, without taking instruction, did not object to the oral application.

(4) The plaintiff's oral application was allowed and the plaintiff was ordered to file and serve the amended writ of summons and the amended statement of claim on the first defendant within 14 days from the date thereof and the first defendant was given liberty to file and serve the amended statement of defence within 14 days of receipt of the amended writ of summons and the amended statement of claim.

(5) The amended statement of defence was filed on 14 July 1999 and the first paragraph therein disputed the validity of the amended writ of summons and the amended statement of claim.

(6) The order that was made by the court on 14 June 1999 was drawn up by the first defendant's solicitors and the draft order was sent to the plaintiff's solicitors on 2 December 1999 for approval accompanied by

a covering letter dated 30 November 1999 as reflected in exh. 'A' of encl. 50 – the affidavit of Mr. Tony Dhana that was affirmed on 6 June 2000 and filed on the same date.

(7) The draft order dated 14 June 1999 was not returned by the plaintiff's solicitors and on 6 December 1999 the defendant's solicitors wrote to the court for approval of that draft order.

(8) Without returning the draft order dated 14 June 1999 that was prepared by the first defendant's solicitors, the plaintiff's solicitors adopted an unusual procedure of writing to the defendant's solicitors on 3 December 1999 stating that the plaintiff would be applying to the court for an appointment to settle the terms of the draft order in question (see exh. "AJ3" of encl. 47).

(9) The court fixed 10 December 1999 for the settling of the draft order dated 14 June 1999 but on that day the SAR of civil two court was on an emergency medical leave and so the appointment to settle that draft order was postponed to 14 December 1999.

(10) On 14 December 1999, the plaintiff's solicitors did not turn up for settlement of the draft order dated 14 June 1999 and the SAR of civil two court took the initiative of telephoning the solicitors for the plaintiff to find out why no solicitor attended court on that day on behalf of the plaintiff. It seemed that no reasonable explanation was given.

(11) On the afternoon of 14 December 1999, the plaintiff's solicitors sent their own version of the draft order for 14 June 1999 session to the defendant's solicitors for approval. Naturally the plaintiff's draft order was returned to the plaintiff's solicitors on the next day accompanied by a covering letter dated 14 December 2000 where it was pointed out that the plaintiff had waived the right to object to the first defendant's draft order dated 14 June 1999 and that there was no provision in the RHC for approval of another draft order (referring to the plaintiff's draft order) after expiry for approval of the first defendant's draft order dated 14 June 1999 (see exhs. "C1" and "C2" of encl. 50).

(12) The sealed copy of the order dated 14 June 1999 was subsequently extracted and served on the plaintiff's solicitors on 24 April 2000 as reflected in exh. "AJ7" of encl. 47.

(13) On 23 May 2000, the plaintiff's solicitors applied by way of a summons in chambers in encl. 48 to set aside the order dated 14 June 1999 and in that application the plaintiff also sought for approval of the plaintiff's

draft order which was purportedly served on the court on 8 December 1999. It was submitted by Mr. Tony Dhana that there was no evidence of the plaintiff's draft order being served on the court on 8 December 1999 and that the plaintiff's draft order was only served on the first defendant's solicitors in the afternoon of 14 December 1999 after the plaintiff's solicitors failed to attend court in the morning to settle the draft order dated 14 June 1999.

(14) The summons in chambers in encl. 48 was fixed for hearing on 27 June 2000 before the SAR. But by way of a letter dated 26 June 2000 as seen in encl. 49 and as alluded to earlier, the first defendant's solicitors gave a notice in writing to the plaintiff's solicitors in regard to a number of preliminary objections which the first defendant proposed to take.

(15) As narrated, the 4th and 5th preliminary objections in encl. 49 were heard on 27 June 2000 and the decision was deferred to 28 June 2000. On 28 June 2000, the SAR of civil 5 court wrote a written decision and she dismissed the 4th preliminary objection – meaning the SAR admitted the affidavits in encls. 47 and 51. But in regard to the 5th preliminary objection, the SAR allowed it with no order as to costs – meaning that encl. 53 should not be read in support of the summons in chambers in encl. 48. It must be emphasised that there was no appeal against the decision of the SAR in regard to the inadmissibility of encl. 53.

(16) As narrated, the 1st, 2nd and 3rd preliminary objections of encl. 49 were heard on 28 June 2000 and deferred till 4 July 2000 wherein the SAR dismissed encl. 48 with costs.

(17) It was pointed out by Mr. Tony Dhana that after the submissions were completed on 28 June 2000, the plaintiff's solicitors saw it fit to file an affidavit affirmed by the plaintiff on 29 June 2000 which was filed on 30 June 2000 as seen in encl. 55 and not encl. 54. Mr. Tony Dhana submitted that the affidavit in encl. 55 would, in the circumstances, be inadmissible because no leave was obtained to file it.

So much for the detailed facts. I will now consider the following issues, not in its order of priority.

Are There Legal Grounds For The Perfected And Sealed Order Dated 14 June 1999 To Be Set Aside?

For a start, I should refer to the decision of Chang Min Tat FJ in the case of *Hock Hua Bank Bhd v. Sahari bin Murad* [1981] 1 MLJ 143 FC where his Lordship writing for the then Federal Court had this to say at p. 144 of the report:

> Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St. Nazaire Co.* 12 Ch. D 88; *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v. Neotia & Co.* [1918] AC 888 and *Jonesco v. Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v. Peizer* 65 SJ 607.

and in the context of the present case there was no allegation of fraud nor was there further evidence that could be adduced.

This would be followed by the case of *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 where the then Federal Court allowed a final order to be set aside in a fresh action where the final order was made in contravention of the Malay Reservation Enactment (FMS Cap 142). Here on the facts, the features that were present in *Badiaddin*'s case were not present at all. The present case was not decided against the backdrop of the Malay Reservation Enactment (FMS Cap 142) at all. At p. 93 of the report, Mohd Azmi FCJ (as he then was) aptly said in the *Badiaddin*'s case:

> … any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

and the present case under adjudication would certainly fall outside the "exceptional cases" situation.

It is germane to mention that the "exceptional cases" scenario was vigorously applied by Siti Norma Yaakob JCA (now FCJ) in the case of *Selvam Holdings (Malaysia) Sdn Bhd v. Great Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16 CA. There the Court

of Appeal had to decide which of the two contrary High Court orders had to be complied with. At p. 26 to p. 27 of the report, Siti Norma Yaakob JCA (now FCJ), after setting out the facts and the law, aptly said:

> From what we have said so far can the three interveners intervene in the same proceedings in which the 1993 order was made? We say they can for the following reasons.
>
> Since they have established their interests in the outcome of the originating summons and such interests have not been disputed, the fact that they have not been cited as parties in the proceedings and that the 1993 order was obtained without their knowledge have deprived them of their right to be heard on their interests. This is a breach of the rules of natural justice and following *Eu Finance Berhad*'s case *(supra)*, the 1993 order is a nullity and can be successfully attacked in collateral proceedings *ex debito justitiae.*
>
> In this regard, the conduct of the appellant is most relevant and most telling. The originating summons was filed whilst the originating motion before Abdul Aziz Mohamad J was part heard pending decision. Both summonses seek remedies that have the same effect. The originating summons was heard two weeks after it was filed, thereby stealing a march on the originating motion.
>
> We say that the appellant's behaviour is highly questionable and that of their solicitors most unprofessional. Under these circumstances we consider that filing a fresh action to set aside the 1993 order is an exercise in futility as it is counter productive and it will be adding another suit to an already long list of actions relating to the same subject matter. One need only read the judgment of the trial judge to appreciate the numerous suits and summonses filed by the appellant following their non-acceptance of the winding up order as they contend that they were not the entity affected by the order. But they had not appealed against that order. Instead they filed the originating motion which has since been decided by Abdul Aziz Mohamad, J. Again no appeal had been lodged by the appellant in that originating motion. This later judgment runs contrary to the 1993 order and whilst we appreciate that a court is not bound by a decision of another court exercising concurrent jurisdiction, nonetheless the appellant are now placed in the most anomalous position in that there are two existing and conflicting orders as to their legal status. Since the appellant had not appealed against both orders, the interveners have provided the alternative whereby the appellant's legal status can be finally resolved.
>
> Under these circumstances we consider that the justice of the case entitles the interveners to apply to set aside the 1993 order *ex debito justitiae* in the same proceedings in which the 1993 order was made and further that the High Court was not *functus officio* to hear and determine such application under its inherent jurisdiction and we so hold. For the reasons stated we uphold the decision of the High Court and affirm the orders it made on 7 November 1997. Consequently, we dismiss this appeal with costs and order that the deposit be paid to the interveners to account of their taxed costs.

a In respect of costs, considering that there is a valid winding up order against the appellant, we direct that the costs be borne by JL Selvam personally.

Her Ladyship summarised the law in these words (see p. 23 to p. 24 of the report):

b The principles of law as enunciated by the Federal Court in *Hock Hua Bank*'s case *(supra)* can be stated in the following manner.

Once an order of court has been drawn up and perfected and it becomes a final order, it cannot be altered, varied or set aside in the same action as the court has become *functus officio* and the court has no jurisdiction to entertain c any application to alter, vary or set aside the final order. However like any other general principle, there are exceptions to it and in the following cases, the same court has the inherent power to entertain any application to amend or set aside a final order.

1. Under O. 20 r. 11 of the Rules of the High Court 1980, better known as d the slip rule, insofar as it is necessary to correct errors in expressing the intention of the court.

2. The order relates to a judgment in default or made in the absence of a party at the trial or hearing.

e Then in 1982, following *Eu Finance Bhd. v. Lim Yoke Foo* [1982] 2 MLJ 37, another category of cases was added to the aforesaid list. These cases refer to orders that have been obtained in breach of the rules of natural justice as such orders are nullities and they can be successfully attacked in collateral proceedings *ex debito justitiae*.

f Despite the above restrictions, an aggrieved party can still impeach a regularly drawn up order but only in a fresh suit brought to attack the order on the grounds that such an order had been obtained by fraud or that fresh evidence, not available at the trial or hearing, had since surfaced that may affect the order. To this we like to add another situation where a regularly obtained order can be questioned ie, where the order had been entered by consent. Under those g circumstances the aggrieved party may institute fresh proceedings to attack the consent order.

In all the instances that we have cited, the normal appeal procedure is dispensed with. See also *Muniandy a/l Thamba Kaundan & Anor. v. D & C Bank Bhd. & Anor.* [1996] 2 CLJ 586; and *Craig v. Kanssen* [1943] 1 All ER 108.

h That was the situation until 1998 when *Badiaddin*'s case, *(supra)* came to be decided. *Badiaddin*'s case, we say, extended the scope and extent of the inherent and discretionary jurisdiction of a court with unlimited jurisdiction to set aside an earlier order in the following two circumstances:

i

(1) where the earlier order had contravened a substantive statutory prohibition so as render the earlier order defective on the ground of illegality or lack of jurisdiction and

(2) where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside.

Under the aforesaid circumstances, a court is seised with the necessary jurisdiction to entertain an application to set aside the earlier order *ex debito justitiae*. Expressed in another way there is no need to adopt the appeal procedure nor to file a fresh suit to set aside the defective order. That can be done in the same proceedings where the impeached order was granted and before the same judge or another judge with concurrent jurisdiction.

Next, it would be the case of *Tenaga Nasional Berhad v. Prorak Sdn Bhd & Anor (supra)* where Gopal Sri Ram JCA applied the speech of Edgar Joseph Jr. FCJ in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 (see p. 559 of the report in *Tenaga Nasional Berhad v. Prorak Sdn Bhd & Anor (supra)*):

It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.

The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made:

(a) with reasonable promptitude, in other words within a reasonable time; and

(b) before the defendant has taken any fresh step after becoming aware of the irregularity.

(See Order 2 r. 2(i) of the Rules of the High Court 1980).

and I venture to say that there was nothing irregular in regard to the perfected and sealed order dated 14 June 1999. In short, there were no legal grounds to set aside the perfected and sealed order dated 14 June 1999. This was my judgment and I so hold accordingly.

Can The Plaintiff Be Deemed To Have Consented To The Perfected And Sealed Order Dated 14 June 1999?

In order to answer this crucial question, I must refer to the relevant provisions of the RHC. For a start, reference to O. 42 r. 8(1) of the RHC must be made and it is worded as follows:

> (1) Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party who shall within 2 days of the receipt thereof, or within such further time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments thereto.

Then there is O. 42 r. 10(4) of the RHC and it states as follows:

> Every order required to be drawn up must be drawn up by the party in whose favour the order has been made and if that party fails to draw up the order within 7 days after it is made any other party affected by the order may draw it up.

The deeming provision is seen in O. 42 r. 8(2) of the RHC and it is worded in this way:

> When the solicitor omits to return the copy of the draft within the time prescribed, he shall be deemed to have consented to the terms thereof.

Now, from the narrative of the facts, the plaintiff's solicitors did not send a copy of the draft order dated 14 June 1999 to the defendant's solicitors. This prompted the first defendant's solicitors to send a copy of the draft order prepared by the first defendant's solicitors to the plaintiff's solicitors for approval on 2 December 1999 (see para. 6 of encl. 50 and exh. "A" of encl. 50). The plaintiff's solicitors did not return the draft order that was sent by the first defendant's solicitors and so the plaintiff's solicitors are deemed to have consented to the terms thereof.

Order 42 r. 9 of the RHC does not prohibit the drawing up of the order. Order 42 r. 9(2) of the RHC states as follows:

> An order –
>
> (a) which –
>
> (i) extends the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act; or
>
> (ii) grants leave for the doing of any of the acts mentioned in paragraph (3); and
>
> (b) which neither imposes any special terms nor includes any special directions other than a direction as to costs,
>
> need not be drawn up unless the Court otherwise directs.

and the operative words are "need not" (meaning it does not make it obligatory) as opposed to "shall not". Thus, where the circumstances require and the order is then drawn up, then the deeming provision of O. 42 r. 8(2) of the RHC would apply. For all these reasons, the answer to the question posed would be in the affirmative.

Has The Plaintiff Waived His Right To Object To The Draft Order Prepared By The First Defendant's Solicitors?

Instead of returning the draft order dated 14 June 1999 that was sent by the first defendant's solicitors with whatever amendments envisaged by the plaintiff as required by the RHC, the plaintiff's solicitors wrote to the first defendant's solicitors on 3 December 1999 with a copy being extended to the court and stated that the plaintiff would be applying to the SAR for an appointment to settle the draft order (see exh. "AJ3" of encl. 47). Although the procedure that was adopted by the plaintiff's solicitors was unknown and quite foreign to the RHC, yet the High Court was magnanimous and it fixed 10 December 1999 as the date for the settling of the draft order. Unfortunately on that day the SAR of the civil two court was on an emergency medical leave and the matter was fixed for hearing on 14 December 1999 (see para. 8 of encl. 50). On 14 December 1999, the plaintiff's solicitors did not turn up to settle the draft order. The SAR of the civil 2 court personally rang up the plaintiff's solicitors to find out why no reasonable explanation was given for the plaintiff's solicitor's absence (see para. 9 of encl. 50). All these background facts would certainly show that the plaintiff had waived his right to object to the draft order and thus was not entitled to object to the draft order now. The plaintiff's solicitors were not ignorant laypersons but professionals who must know the law. The waiver on the part of the plaintiff's solicitors must necessarily mean the waiver on the part of the plaintiff himself since the plaintiff was, at all material times, represented by his solicitors. That waiver was exercised by the plaintiff and/or his solicitors with full knowledge of its consequences. As Lord Chelmsford LC in *Darnley (Earl of) v. Proprietors of London, Chatham and Dover Rly* [1867] LR 2 HL 43 at p. 57 said:

> A waiver must be an intentional act with knowledge.

I would accordingly answer the question posed in the affirmative.

Was The Plaintiff's Failure To Disclose Material Facts Fatal?

There were non-disclosures on the part of the plaintiff and these non-disclosures may be itemised as follows:

(1) The plaintiff's affidavit in encl. 47 that supported the summons in chambers in encl. 48 did not disclose that the plaintiff was accorded an opportunity to settle the draft order.

(2) The plaintiff's affidavit in encl. 47 too did not mention that the plaintiff's solicitors failed to attend court on 14 December 1999 in order to settle the draft order.

(3) There was no reason advanced in encl. 47 for the failure of the plaintiff's solicitors to attend court on 14 December 1999 to settle the draft order.

(4) Sadly, there was an attempt to mislead the court when the plaintiff averred that the plaintiff's draft order was sent to the court on 8 December 1999 (see prayer (b) of encl. 48). In reality, the plaintiff's draft order was only served on the defendant's solicitors at about 1.15pm on 14 December 1999 after the plaintiff's solicitors failed to attend court in the morning of 14 December 1999 to settle the draft order dated 14 June 1999.

These non-disclosures must be construed adversely against the plaintiff. It was certainly fatal. At party seeking to invoke the discretion of the court should come to court with clean hands. In the words of VC George J (as he then was) in *Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor* [1986] 1 CLJ 417, 422; [1986] CLJ (Rep) 371 the plaintiff's affidavit in encl. 47 had "fallen far short of the test of being frank, candid and honest" and, consequently, the plaintiff was not entitled to and will certainly not obtain the assistance of this court.

Conclusion

For the reasons adumbrated above, I dismissed the plaintiff's appeal in encl. 56 with costs. Meanwhile, the pre-trial case management under O. 34 r. 4(2)(a) to (m) of the RHC went on smoothly.